IN THE

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 100.

THE VIRGINIA AND ALABAMA COAL COMPANY, SUING IN ITS OWN BEHALF AND FOR THE USE OF THE SLOSS IRON AND STEEL COMPANY, APPELLANT,

vs.

THE CENTRAL RAILROAD AND BANKING COMPANY OF GEORGIA ET AL., APPELLEES.

APPEAL FROM CIRCUIT COURT, SOUTHERN DISTRICT OF GEORGIA.

Certiorari from the United States Circuit Court of Appeals, Fifth Circuit.

STATEMENT OF THE CASE.

On June 1, 1891, the Central Railroad and Banking Company of Georgia leased to the Georgia Pacific Railway Company for a term of ninety-nine years all of its railroad lines and their appurtenances, reserving unto itself only its bank-

ing-house in the city of Savannah and its banking assets. All the revenues arising from the lines of the Central Company and all the income and profits arising from stocks and bonds belonging to the Central Company were assigned and set over to the lessee, the lessee agreeing for its part, among other things, to pay the interest on all bonded and other indebtedness of the lessor and to pay as rental an amount equivalent to 7 per centum per annum upon the capital stock of the lessor. The lease demised (Record, p. 22) "all * * * fuel, material, and supplies" then possessed by the Central, and the twenty-first article (p. 30) provided that at its termination for any cause the Danville Company would return to the Central Company the "property hereby demised," except such as should be disposed of, in as good condition as when received, without allowance for betterments. While it was provided in the sixteenth article (p. 28) that the Danville Company took it as a running road and agreed to pay current expenses, receiving current earnings, there was no similar provision with reference to their surrender of possession. On the contrary, article 21 shows a contrary intention. The lease also provided that a certain sum should be paid to the Central Company annually for the independent maintenance of its corporate organization.

The Georgia Pacific Railway Company had previously leased its railroad to the Richmond and Danville Railroad Company, which operated a railroad between Atlanta, Ga., and Washington, D. C., and many other points. The Danville Company, by virtue of its control over the Georgia Pacific Company and at the request of that company (Record, p. 4), went into possession of the railroads of the Central Company, appointed its own officers, and assumed their operation; so that the Danville Company was in substance the lessee of the railroads of the Central Company and will be hereinafter referred to as such.

The Danville Company continued to operate the lines of the Central Company under said lease until the fourth day

of March, 1892, when Mrs. Rowena M. Clarke, a stockholder of the Central Railroad and Banking Company of Georgia, filed in the court below her bill, on behalf of herself and all other stockholders of the Central Company, against The Central Company, The Danville Company, The Georgia Pacific Company, and other defendants.

This bill was brought for the purpose of canceling the lease of the Central Railroad lines to the Georgia Pacific Company and to restrain the West Point Terminal Company from voting the majority stock of the Central Company, then owned by it. The bill prayed for injunction and receiver. Upon the day it was filed a temporary receiver was appointed under it for the Central Railroad and Banking Company of Georgia. This bill contained no suggestion or allegation that the Central Company was insolvent.

On the hearing of the rule *nisi* for injunction and receiver both the Danville Company and the Georgia Pacific Railway Company entered a formal disclaimer as to their right to hold possession of and operate the Central railroad under said lease, whereupon the Central Company filed its answer, in which it stated that it had in good faith asserted the validity and legality of the lease, but that in view of the disclaimers filed by the other parties to the lease it submitted itself to the jurisdiction of the court, and prayed the direction of the court as to what course it should pursue. Upon the hearing of this rule, on March 28, 1892, the court passed an order appointing the directors of the Central Company receivers of all its property and assets, to take charge of the same, and to operate the railroad until there could be a reorganization of its board of directors under and in pursuance of the provisions of the charter of the Central Company and of the order of the court, and to turn over said railroad and said property and assets to the newly elected board of directors when reorganized. The validity of the lease was not touched or passed upon by the court.

The new board of directors of the Central Company was duly elected, but instead of applying to the court for the properties they, on July 4, 1892, caused the Central Company to file a dependent bill against the Farmers' Loan and Trust Company of New York, trustee, and other creditors, under which it set up that on account of the appropriation by the Danville Company of its revenues, and from other causes, it was unable to meet its maturing obligations, and had defaulted on July 1, 1892, on the semi-annual interest due on $5,000,000 of the mortgage bonds, dated October 1, 1872, for which the Farmers' Loan and Trust Company was trustee, and for these reasons the company requested the appointment of a receiver, that its affairs might be administered for the benefit of all interested.

Under this dependent bill all the receivers, with the exception of H. M. Comer, were discharged, and he was, on July 15, 1892, appointed and continued as sole receiver.

On January 23, 1893, the Farmers' Loan and Trust Company of New York, trustee of the $5,000,000 mortgage hereinbefore referred to, filed its dependent bill for the foreclosure of said mortgage, and to collect and apply to said debt the income of the road, which was pledged under said mortgage; and on said day the court extended the receivership to that bill, appointing H. M. Comer receiver under it, and in connection with his former appointments. The semi-annual interest due the trustee under this mortgage was duly paid in January, 1892, and default on the next semi-annual interest on said bonds was made July 1, 1892. The mortgage provided that the trustee had the right to foreclose six months thereafter. (Record, p. 13, top.)

On June 30, 1893, the bill of Mrs. Rowena M. Clarke against the Central Railroad and Banking Company of Georgia, having come on for a final hearing, was, after argument, dismissed for want of equity, and the injunction granted on March 28, 1892, restraining and prohibiting the West Point Terminal Company from voting the majority stock of the

Central Company was rescinded and vacated. It was expressly provided in this final decree that the question of the validity of the lease by the Central Company to the Georgia Pacific Company was not passed upon in the decree, nor has it ever been passed upon.

The record contains the following stipulation made after the case was appealed: "It is a fact that since the receivership the receivers of the Central Railroad & Banking Company of Georgia have expended [for] betterments in its railroad lines from the income of the road during the receivership a sum much larger than the entire claim of the intervenors." There is nothing else in the record to show any expenditures. It does not appear when they were made nor what was their nature, nor does the record disclose the nature or amount of debts sought to be enforced and on which preferences are claimed.

Into this litigation comes, by intervention, the Virginia and Alabama Coal Company, in its own behalf, and for the use of the Sloss Iron and Steel Company, and asks judgment against the Danville Company and the Central Company for coal furnished under a contract dated July 13, 1891, set out in the record (p. 36), which coal was used in the operation of the railroad of the Central Company. Whether the contract was made with the Danville or with the Central Company is a disputed fact. The claim of the Virginia Company is for $26,607.44, and of the Sloss Company $14,359.38.

The original intervention of the Virgina Company simply asked for a decree against the defendants The Central Company and the Danville Company, jointly and severally: it did not ask that the debt be paid out of the income of the receivership, or that it be given a preference over all other creditors. The receivers were made parties, but no relief against them was asked. Subsequently it amended its intervention and alleged that at the time of the appointment of the receiver of the Central there was a considerable portion of the said coal still in the bins of the Central, and that

for this coal it should have a decree charging the value of this coal upon the income of the receivership as a part of the receivership operating expenses and constituting it a preferential debt over that of all other creditors of the Central Company, and that the value of this coal should be determined, not by the contract price, but by its market value, which was considerably in excess of the contract price. The same is true of the intervention of the Sloss Company. It asks a joint and several judgment against the Central Company and the Danville Company for its whole claim, but asks a preference over all other creditors of the Central Company only as to the value of the coal which went into the possession of the receiver of the Central Company, the value being determined by the market value and not the contract price.

The defendants, The Central Company and its receivers, demurred to both interventions—first, on the ground that the interventions did not set forth any cause of action against them; and, second, that from the averments of the interventions it appeared that the contract set up therein was made with the Danville Company alone, and that if there was any indebtedness thereunder it was the indebtedness of that company and not of the Central Company or of its receivers.

The master found the Danville Company and the Central Company and the receivers of the Central, jointly and severally, liable to the Virginia Company for $26,607.44 and to the Sloss Company for $14,339.38, finding the value of the coal in the bins at the time of the appointment of the receiver at the contract price and not at the market value, as contended for in the interventions; and, further, that upon the payment of these amounts by the Central Company or its receivers that a judgment should be entered in its favor against the Danville Company for whatever sum might be paid for coal delivered prior to March 4, 1892, and coal used before the appointment of a receiver. The master found in supplemental reports that $5,543.10 of the Virginia Com-

pany's coal and $2,682.80 of the Sloss Company's coal was delivered to and consumed by other railroad companies not connected in any manner with the Central Company, and therefore deducted these two amounts from the respective claims of the Virginia Company and the Sloss Company.

The master in his finding upon the facts found separately the amount of coal delivered and consumed before March 4, 1892, the date of the receivership, the amount in the bins at the appointment of the receiver, and the amount delivered to the receivers subsequent to March 4, 1892, as follows:

VIRGINIA AND ALABAMA COAL COMPANY.

Delivered and consumed before March 4, 1892..	$13,735 80
In bins at appointment of receiver, March 4, 1892.	6,700 50
Delivered subsequent to March 4, 1892.....	6,171 30
	$26,607 60
Deduct coal delivered and consumed by other companies not connected with the Central, as found by supplemental report of master.....	5,543 10
	$21,064 50

SLOSS IRON AND STEEL COMPANY.

Delivered and consumed before March 4, 1892..	$9,766 28
In bins at appointment of receiver, March 4, 1892.....	3,817 10
Delivered subsequent to March 4, 1892.....	776 00
	$14,359 38
Deduct amount delivered to and consumed by other companies not connected with the Central, as per master's supplemental report.....	2,682 80
	$11,676 58

Upon exceptions to the master's report, the circuit court held that, the contract having been made with the Danville Company, that company alone was liable to the intervenor for all coal delivered and consumed prior to the receivership of the Central railroad, and likewise for all coal in the bins of the Central railroad at the time of the appointment of the receiver, and that the Central Company was not liable for such coal, but that the receivers of the Central Company should pay from the current earnings of the railroad at contract price, without interest, for all coal received by them from the intervenors after the 4th of March, 1892, the date of the first receivership, and that the value of the coal so received was, in the case of the Virginia Company, $6,171.97, and in the case of the Sloss Company $735.16. These amounts are not in dispute and have been paid.

The difference in the values of the Sloss Company's coal delivered after the receivership as found by the master and by the court is accounted for by the fact that the master computed it at 95 cents a ton and the court at 90 cents a ton.

The intervenors appealed from the decree of the circuit court to the circuit court of appeals for the fifth circuit, and the circuit court of appeals reversed the decree of the circuit court, and found that the receivers of the Central Company were liable at the contract price, not only for the coal which they received after their appointment, but also for the coal which was in the bins at the date of their appointment and for coal delivered to and used in the operation of the railroad lines of the Central Company prior to their appointment and which was then unpaid for, but that they were not liable for the coal which the master had found was delivered under the contract to other railroad companies not connected in any manner with the Central and which he had disallowed in his supplemental report. The court of appeals found that, irrespective of the question whether the contract was made by and with the Danville Company or the Central

Company, the coal having been used in the operation of the railroads of the latter company, it was a debt of the latter company of such a character as should be given a preference over all other creditors and to be paid out of the receivership income, and, if that was not sufficient, out of the corpus of the property.

To review this decree the writ of certiorari of this Court was issued.

STATEMENTS IN APPELLANTS' BRIEF DISPUTED.

1. Stipulation of counsel as to delivery of coal is invariably shown in appellants' brief to cover delivery "to the (railroad lines of the) Central Railroad and Banking Company of Georgia." The parenthesis is misleading and is not in the stipulation. The language was carefully selected and was meant to carefully exclude the idea of delivery to the Central corporation.

2. Appellants' Brief says (p. 21) that when the receiver was applied for the lawfulness of the lease was not even asserted. There is no justification for this statement. The Danville Company took no position on the point; the Pacific Company attacked it solely on the ground that its stockholders had not acted, while the Central Company (Record, top of p. 5) "continued in good faith to assert the legality and validity of said lease," and has never abandoned this position, unless submission to the jurisdiction of the court be so construed; and yet counsel goes so far as to assert on page 23 that neither lessee nor lessor asserted its validity. The statement is misleading.

3. On page 24 of Appellants' Brief it is said that the Pacific Company, "without a syllable of writing," turned the

Central property over to the Danville Company. The record will be vainly searched for "a syllable of writing" to justify this statement.

4. It is taken from an unpublished opinion of Judge Speer (quoted on p. 28, Appellants' Brief) in Macon Foundry and Machine Works case, which seems to be relied upon by counsel as controlling this one. Not only does the decision of the district judge not bind the Supreme Court, but statements of fact in his opinion cannot be interpolated into this record, particularly when they are shown by the record to be incorrect.

The case was a small one, and the details of its facts peculiar to itself. For these reasons it was not appealed; but the conclusions reached in that opinion have been strenuously and continuously disputed by these appellees, and are thoroughly unsound. It may be significant that the opinion has never been permitted to appear in the reports.

BRIEF OF THE ARGUMENT.

I.

Appellants, by their pleadings, do not claim any preference for coal delivered and consumed before the receivership, and that question is not properly before this Court.

It will be observed that in the original intervention of the Virginia Company (Record, p. 34) the prayer was solely for a judgment against the Central Railroad and Banking Company of Georgia and its receivers and the Richmond and Danville Railroad Company, and that the only amendment which has ever been filed to this intervention (Record, p. 51) makes no change in the prayer except to the effect that "so much of said sum of $26,607.44 as is for coal taken possession of and used by said receivers in the operation of the railroad and other property in their hands may be decreed to be paid by the receiver of this court as part of the expenses of operating said business," although it is alleged in the body of the amendment (p. 52) that "the same is a charge upon the income of the property of the said Central Railroad & Banking Company of Georgia that should be paid ahead of all debts, liens, and priorities existing against said company."

The intervention of the Sloss Iron and Steel Company (p. 153) was drawn by the same hand, and prayed solely for a judgment against the Richmond and Danville Railroad Company and the Central Railroad and Banking Company of Georgia for the entire $14,359.38, and against H. M. Comer, as receiver for the value of the coal taken possession of by the receivers. The Sloss intervention was not filed until December 3, 1892, more than two months after the inter-

vention of the Virginia Company had been perfected by amendment. No amendment was therefore filed to the Sloss intervention, except the one appearing on page 172, inserting the name of the Virginia Company as usee.

No amendments to these interventions have been filed other than those herein cited, and it will appear from these that the only prayers of these intervenors and appellants other than for ordinary judgments are (1) that so much of the Virginia Company's claim as is for coal taken possession of by the receivers may be paid by the receivers as operating expenses, nothing being said as to the preferential character of the claim, and (2) ,in the Sloss Company's intervention, that they may have a judgment against Comer, receiver, for the value of the coal which went into the possession of the receivers, although there is an allegation, on page 154, that the claim is for operating expenses, and is a first lien upon the property of the Central Company.

The coal which was received by the receivers after March 4, 1892, has been paid for, and it will therefore appear that the only issue before this Court is whether the Central Company is liable for the coal which was delivered and consumed during the possession of the Danville Company prior to the receivership, and, if it be so liable, whether it is a preferential debt. As the briefs of appellants' counsel, however, discuss the case on the theory that this Court has before it for decision the question as to coal delivered and consumed prior to the receivership, it is necessary for us to do the same. But we make this discussion under protest, asseverating that **the question is not before the Court, and that there are no pleadings** under which the Court could give any preference to the claim of the appellants for coal delivered and consumed prior to the receivership. As to this coal the only question before the Court is whether the Central Railroad and Banking Company of Georgia is liable for it as a simple contract creditor and without reference to preference.

II.

The contract was made with the Danville Company and not with the Central Company.

Before discussing the legal questions in the case it is proper to determine this fundamental fact, which the intervenor disputes in the face of its own pleading and the overwhelming evidence of the record. The contract under which both coal companies sold the coal is as follows (Record, p. 36):

"Richmond & Danville Railroad Company.
"Office General Purchasing Agent, Atlanta, Ga.
"Joseph P. Minetree, General Purchasing Agent.

"The Virginia & Alabama Coal Co., Mr. J. R. Ryan,
V. P. & G. M., Birmingham, Ala.:

"Dear Sir: We beg to accept your verbal offer of today to furnish the C. R. R. & B. Co. of Ga. with, say, 275,000 tons of best quality engine steam coal for the next twelve months, commencing July 1, 1891, and ending July 1, 1892, at 90 cents per ton of 2,000 lbs., to be delivered on cars at mines, and to be shipped at times and in quantities to suit. Settlements for the coal delivered in any one month to be made on or about the first of the second succeeding month; and the C. R. R. & B. Co. of Ga. reserves the right to increase or decrease the monthly deliveries upon reasonable notice at any time. The division superintendents of the divisions for which the coal will be required will communicate with you as to the monthly deliveries, and all bills for coal furnished under this contract to be sent direct to the division superintendents. Kindly confirm this at once and oblige,

"Yours truly,
"(Signed) Joseph P. Minetree,
"*General Purchasing Agent.*

"July 13, 1891."

The master found as a fact that the Danville railroad was operating the lines of the Central Company and conducting all the business of the said corporation, save and except the banking business, from the 1st of June, 1891, to the 4th of March, 1892; that the intervenors had no notice of the contract of lease save and except what came to them from public notoriety and the press comment; that the negotiations which ended in the contract were begun with W. H. Green, general manager of the Danville Company; that the intervenors did not understand at the time of the contract that they were selling to the Danville Company, but were assured by Minetree that he had the right to purchase for both the Danville and the Central Company, and Ryan, the general manager of the Virginia Company, understood at the time of entering into the contract that he was selling direct to the Central Company.

Upon these findings of fact the master concluded that the contract was made with the Central Railroad and Banking Company of Georgia.

It appears from the evidence of Ryan, the general manager of the Virginia Coal Company (Record, pp. 93, 94), and of Seddon, the president of the Sloss Company (Record, pp. 203, 204), that the several coal companies operating in the southern territory had entered into an agreement to "squeeze" the railroads (Record, p. 93), wherein it was agreed that certain coal companies should sell only to certain railroads, the object of the combination being to stop competition and to force up the price of coal, and that under this arrangement the Virginia Company was prohibited from selling coal to the Danville Company, and that this was the only reason that the name of the Central Company was used in the contract.

The circuit court, upon review of the finding of this fact by the master, held that the contract was made with the Danville Company and not with the Central Company, using the following language:

"The evidence discloses the fact that the agents of the intervenor companies hesitated and, indeed, refused for a time to supply the coal desired by the purchasing agent of the Richmond and Danville; but, by a process of casuistry noteworthy, at least, for its elasticity, an arrangement was made to furnish the coal nominally for the Central, but really for the Richmond & Danville. This is perfectly clear from the evidence of Mr. Ryan, the vice-president and general manager of the Virginia & Alabama Coal Company. No officer of the Central had any knowledge of the contract."

The circuit court of appeals held that it made no difference whether the contract for the purchase of coal was made by the Central Company or the Danville Company. In either event its conclusion was the same: that the Central Railroad and Banking Company of Georgia was liable.

The following extracts from the record demonstrate that the contract was made with the Danville Company, and that the intervenors knew that they were making a contract with the Danville Company and not with the Central Company.

The intervention of the Virginia Company alleged as follows (Record, p. 34):

"And thereupon intervenor shows to the court that the said Richmond & Danville Railroad Company, while operating the said Central Railroad & Banking Company of Georgia, purchased from intervenor for the use and benefit of the said Central Railroad & Banking Company, in the several divisions, coal; which **purchase was made in pursuance of the contract of said Richmond & Danville Railroad** Company, dated July 13th, 1891."

The intervention of the Sloss Company alleged as follows (Record, p. 153):

"During the period in which the said Richmond & Danville Railroad Company operated said Central Railroad & Banking Company as aforesaid, **petitioner sold to the said Richmond & Danville railroad,** to be used and consumed in operating the said Central Railroad & Banking Company of Georgia, coal and coke," etc.

The following agreed statement of fact is found in the Record, p. 2:

"On June 1st the Richmond and Danville Railroad Company, **through its officers,** went into possession of the railroads of the Central Railroad & Banking Company of Georgia, and operated the same until March 4th, 1892."

The testimony of E. P. Alexander, who was president of the Central Company, states (Record, p. 149) "that the Central Company had no employés whatever engaged in railroad operation, and that the only employés which it had were its president and board of directors and the employés engaged in its banking business." And again, in explaining why it was not deemed necessary to specifically notify people with whom the Central had had dealings of the lease, he said (Record, p. 152): "The matter was already as notorious and as much talked of as a war would have been."

It does not appear that the Central Company had ever had any dealings with either of the coal companies before the lease, so, of course, there was no obligation to specifically inform them of the change. Upon this point the general manager of the Virginia Coal Company testified as follows (Record, p. 97):

"Q. Had your company supplied the Central Railroad & Banking Company of Georgia with coal previous to the lease in June, 1891, to the Richmond & Danville Railroad Company? A. I do not know, sir; I do not think we had. I do not remember. Q. Had you supplied the Richmond & Danville previous to that time? A. Yes, sir."

He further testified (Record, p. 94):

"Q. Do you know, or not know, that during the period of these shipments the Richmond & Danville had leased the Central railroad? A. I know what I heard about them. Q. Well, heard from whom; from the Central officials and the Richmond & Danville—both or either? A. Well, I heard from both."

Seddon, president of the Sloss Company, testified on direct examination (Record, p. 197):

"Q. Under what contract was the coal shipped which is represented by this account? A. Under a contract made between Mr. Minetree, purchasing agent, and the Virginia & Alabama Coal Company, and the subsequent modification of that contract by Capt. Green. Q. You refer to the contract between the Virginia & Alabama Coal Company and Mr. Minetree. Do you mean the Ryan contract, which is attached as an exhibit to the intervention of the Virginia & Alabama Coal Company? A. Yes, sir; that is the conclusion of the various agreements between us—between Ryan and the authorities of the Richmond & Danville."

That the lease was a matter of public notoriety and that Minetree was purchasing agent of the Danville Company appears from Seddon's testimony (Record, pp. 199, 200). But if the lease had been unknown to intervenors, why should they suppose that a Danville Company's officer could contract for the Central Company? Before the Central Company can be bound by Minetree's acts it must be affirmatively shown that he was either an officer or an authorized agent of the Central Company. The evidence is conclusive that he was not authorized.

III.

The Central Company (the lessor) is not liable upon the contract of the Danville Company (the lessee).

The Central Company was neither a party nor a privy to the contract between the appellants and the Danville Company, and therefore it would seem plain that the Central Company could not be held liable upon the contract.

The theory of the appellants is that a railroad company, being a quasi-public corporation, is under certain public obligations, and that one of these obligations is the duty to

operate its railroad, which it cannot escape by a mere lease of its railroad to another; that it is absolutely necessary that coal should be used in the operation of the railroad, and therefore the lessor is liable for all coal used in the operation of the railroad, notwithstanding the fact that the coal was sold to the lessee.

The fallacy in this argument is patent. The appellants confuse the public obligation to operate the railroad with the private obligation to pay a debt incurred by some one else in the operation of the railroad. It is not a matter of public concern whether the appellants' debt is paid by the Danville Company or by the Central Company, or indeed whether it is paid at all. The appellants' claim arises out of the breach of an express contract which they made with the Danville Company, and not out of the breach of any public duty of the Central Company's.

There are many cases which hold the lessor and lessee jointly and severally liable for personal injuries received by third persons injured in the operation of the railroad. These cases proceed upon the theory that the lessor is liable because it cannot escape its public obligations by a lease of its railroad, and it is therefore liable to any one injured by or through a breach of such obligations. Thus, a passenger on a railroad operated by a lessee is injured; he brings an action against the lessor sounding in tort, and the lessor is held liable because the passenger's right of action sprung out of the breach of a public duty. If the injured passenger should sue the lessor upon his private contract with the lessee he should not recover, because in that event his right of action would spring from the breach of a private contract to which the lessor would be neither party nor privy. Again, a man's cattle is injured through the failure to fence the railroad. The obligation to fence being a statutory duty of the lessor, the lessor would be liable, notwithstanding the lease of the railroad, for the reason that the injury to the cattle would be the result of the breach of the

public duty of the lessor. Instances might be multiplied where the lessor has been held liable for the breach of public duties. **No case has ever been decided which held the lessor responsible for the simple contracts of the lessee.**

The cases upon this subject are collected in the following text books:

3 Wood on Railroads, sec. 490 *et seq.*

19 American & English Ency. of Law, p. 897.

2 Elliott on Railroads, sec. 466 *et seq.*

The distinction between the liability of the lessor for the breach of public obligations and its non-liability upon the contracts of the lessee is well illustrated by the case of a servant of the lessee suing the lessor for damages for personal injury. It is held in this case that, whether the lease is valid or invalid, the lessor is not liable to the lessee's servant, because the servant's right of action flows from the contract with his master.

2 Elliott on Railroads, sec. 472.

East Line & Red River R. Co. *vs.* Culberson, 72 Tex., 375 (10 S. W. Rep., 706).

Baltimore & O. & C. R. Co. *vs.* Pane, 143 Ind., 23 (40 N. E. Rep., 519).

The Louisville and Nashville Railroad Company contracted for the carriage of the United States mail and for the safe carriage of the mail clerk over the Nashville and Decatur railroad, which it had leased. The mail clerk was injured, and brought suit against the Nashville and Decatur Railroad Company. It was held that he was a passenger for hire, but was not entitled to recover against the Nashville and Decatur Railroad Company, the lessor, because there was no privity on the contract of carriage between him and the defendant.

Arrowsmith *vs.* Nashville & D. R. Co., 57 Fed. Rep., 165.

The case of Singleton *vs.* Southwestern Railroad Company, 70 Ga., 464, cited by appellants, draws the distinction between the liability for the breach of the public obligations of the lessor and for the contracts of the lessee. Singleton was a passenger. The Southwestern railroad was leased to the Central Railroad and Banking Company of Georgia. The case of Jones *vs.* The Georgia Southern Railroad, 66 Ga., 558, was cited as an authority for the defendant. The court, distinguishing the Singleton case from the Jones case, held (page 472) that the cases were widely different; that Singleton was a passenger and Jones a servant; the former could rely upon the public duty of the lessor; the latter derived his rights through his contract with his master, the lessee.

"A promise by the general manager of the lessee of a railroad to allow an employé his expenses as part of his salary will not render the lessor liable for the payment of such expenses after the termination of the lease."

Galveston, H. & S. A. R'y Co. *vs.* Scheidemantel, 24 S. W. Rep., 328.

In 2 Elliott on Railroads, sec. 475, the exact point is covered: "The case of one who founds his claim upon a contract with the lessee after the execution of the lease is essentially different from that of one who bases his right on the tort of the lessee. It is obvious that the lessor cannot be held liable for a breach of the contracts entered into by the lessee. If the action is founded on the contract, there is no privity between the lessor and the person with whom the lessee contracts. The contract gives the person with whom the lessee contracts no right of action against the lessor, for the latter has assumed no obligation whatever."

The appellants assert that if the lease is void the Richmond and Danville must be held to have been the agent of the Central in the operation of the railroad, and therefore the Central would be liable upon the contract.

The answer to this is obvious. There is nothing in the pleadings and absolutely no evidence in the case to warrant the contention that the lease is void. In the final decree on the Rowena Clarke bill this question was specifically not passed upon; neither the master, the circuit court, nor the circuit court of appeals passed upon the question.

It is utterly immaterial, so far as this question is concerned, whether the lease was valid or invalid. The contract for the purchase of the coal was not a part of the lease contract; it was entirely outside and independent of it. It would be a remarkable rule of law which would construe a void lease into an instrument giving the lessee the power to bind the lessor for its (lessee's) private contracts. If the lease was void this did not affect the coal contract; it could not change the parties to it or their relation to each other. The intervenors would have no right of action against the lessor because they made a contract with the lessee in a void lease. The question whether the lease was valid or invalid would be material only where the public were concerned.

The case of East Line and Red River R. Co. *vs.* Culberson, 72 Tex., 375, states the point well:

"It does not do to say that the lessee would be the agent of the lessor, as applied to this case. This would be a mere fiction not based upon any sound rule of law. The lessee, under an unauthorized lease, may be deemed the agent of the lessor so far as the latter's duties to the public are concerned. Having undertaken, by its charter, to operate its road, the company which it puts in charge of its line may be looked upon as its agent, so far as its general duties under its franchises are concerned; but the duty which is owed to an employé of the lessee is a special one, and not a duty owed to him in common with the general public."

IV.

Conceding, for the purposes of the argument, that the Central Company is liable upon the Contract, there is no statutory lien in favor of supply creditors.

The appellants contend that the act of the General Assembly of Georgia of February 28, 1876, gives to a creditor who furnished supplies **prior** to the receivership a statutory lien The act is as follows:

"SECTION 1. *Be it enacted, etc.*, That in all cases where the business of any corporation operating a railroad either wholly or partially, in this State, shall, by an order or decree of any court, be placed in the hands of a receiver for the benefit of the creditors or stockholders of said corporation, it shall be the duty of said receiver to apply the income of said railroad to the payment of the incidental expenses necessary to the carrying on said business, which shall include the wages of employés, wood, cross-ties and other material furnished, and which may be necessary for conducting said business and keeping the property in repair and the damages which may arise from the loss or injury to goods, wares and merchandise received by said road for transportation, and for injuries to persons and property caused by the running of the cars on said road, and for which said road is now liable, as common carriers, by the laws of this State, and a lien is hereby created on the gross income of said road, while in the hands of such receiver, in favor of such creditors or claimants, superior to all other liens under the laws of this State.

"SEC. 2. *Be it further enacted*, That if said receiver should be removed, or a vacancy occur in said office, and a successor be appointed, it shall be his duty to pay the liens herein provided for, according to their date, out of any funds in his hands as such receiver, whether such liability accrued before or after his appointment.

"SEC. 3. Repeals conflicting laws."

The act clearly does not apply to debts created before a receivership, but applies exclusively to receivership debts. The act, in terms, confines the debts to receivership debts. It says: "It shall be the duty of said receiver to apply the income of said railroad to the payment of the incidental expenses necessary to the carrying on said business," and then enumerates what are the incidental expenses necessary to the carrying on of said business, among which is that for material furnished. Again, our construction of the act is the only one which gives any effect to section 2 of the act. The construction of the appellants would make that section superfluous.

The appellants contend that the act must refer to debts created prior to a receivership, because receivership debts were always preferred under the general principles of equity, and that there was, therefore, no necessity to endow such debts with a statutory lien.

The proposition that all receivership debts were preferred under the general principles of equity was by no means accepted as true in this circuit at the time of the passage of this act. In 1875, just two months previous to this act, a case was decided by Judge Woods in this circuit, in which he held that a judgment obtained by a passenger against a receiver for injury inflicted in the operation of the railroad by the receiver was inferior to the lien of mortgage bondholders.

> Davenport *vs.* Receivers Ala. & Chat. R. R. Co., 2 Woods, 519.

In 1886 Judge Pardee decided in the case of Central Trust Co. of N. Y. *vs.* E. T., V. & G. R. R., 30 Fed. Rep., 895, a case which arose in the circuit court for the northern district of Georgia, that a creditor having a judgment for personal injuries against a mortgagor, growing out of torts committed by it before the receivership, is a general creditor, and his judgment is not entitled to priority of satisfaction out of

the earnings of the receivership, and *a fortiori*, not out of the *corpus* of the estate. This act of 1876 was of force when this case was decided, and, of course, if it applied to debts prior to the receivership, the decision of the case must necessarily have been in favor of the judgment creditor.

At the October term, 1894, the supreme court of Georgia decided in the case of Central Trust Co. of N. Y. *vs.* Thurmand, 94 Ga., 735, that supply creditors whose debts arose prior to the receivership were not entitled to a preference. Here again the decision would have been otherwise if the act of 1876 applied to debts prior to the receivership.

The appellants call attention in their brief to the fact that this case arose under what is commonly known in Georgia as the Insolvent Traders' act, and therefore that the act of 1876 could not have applied. We fail to appreciate any reason why the act of 1876 could not have applied to a suit brought under the Insolvent Traders' act. If there is any statutory lien given by the act of 1876 for debts created prior to a receivership it is not at all affected by the manner in which the receivership arose.

But the supreme court of Georgia, at the March term, 1895, in the case of Green *vs.* Coast Line R'y *et al.*, 97 Ga., 15, allowed a creditor who had obtained a judgment for damages for personal injuries against the corporation prior to the receivership a preference over the mortgage debt upon most remarkable and unusual grounds, the court even going so far as to say, "Every direct authority known to us is against us; nevertheless, we are right, and these authorities are all wrong, as time and further judicial study of the subject will manifest." The act of 1876 was not even referred to in this decision. Surely if the court had thought that the act of 1876 was applicable to debts antedating the receivership it would not have gone out of its way to give a creditor a preference upon such extraordinary so-called equitable reasons.

In our brief in the circuit court of appeals we suggested

that that part of the act of 1876 which refers to injuries to persons may have been intended to meet two decisions of the supreme court of Georgia, rendered in 1875:

Henderson *vs.* Walker, 55 Ga., 481.

Thurmand *vs.* Railroad, 56 Ga., 376.

These two cases decided that the receiver of a railroad was not liable to one of his employés for injuries inflicted by the negligence of a fellow-servant. Railroad companies were so liable under a special statute. Receivers not being mentioned in the statute, and the statute being in derogation of the common law, the court held that the rule of liability with respect to receivers was the common-law rule and not the statutory rule.

These cases decided nothing else, and the question of antecedent debts was not involved.

Since our brief in the circuit court of appeals was written the supreme court of Georgia, in the case of Patterson *vs.* C. R. R. B'k'g Co. *et al.*, 97 Ga., 152, has held that the rule announced in Henderson *vs.* Walker and Thurmand *vs.* Railroad was still the law in this State. The appellants in their brief upon the petition for certiorari say that the supreme court of Georgia has held in this case that the act of 1876 did not affect the cases of Henderson *vs.* Walker and Thurmand *vs.* Railroad, thus implying that the act did not apply to receivership debts. The Patterson case did not even refer to the act of 1876. The effect of the Patterson case was to hold that the act of 1876 had no effect upon the court's decision in the Henderson and Thurmand cases, that a receiver was not liable to his own employé for the negligence of a fellow-servant. Only this fellow-servant question was involved, and by ignoring the act of 1876 in the Patterson decision, the Georgia court has impliedly held that that act did not change the fellow-servant rule in its application to receivers; only this and nothing more. The court did not thereby, even by implication, hold that the act of

1876 did not apply to the receivership claims. The only effect of the decision in the Patterson case is to hold that if the latter part of the act, which enumerates injuries to persons as one of the incidental expenses of a receivership, was intended to change the fellow-servant rule of the Henderson and Thurmand cases, the language of it did not have that effect.

Appellants' counsel refers in his brief to decisions by the circuit court which apply this Georgia statute to debts created prior to the receivership, and says we know of such decisions. In this he is mistaken; we do not know of them, and if the learned judge in the court below has made such decisions, it is very evident from his opinion in this case that he has since changed his mind.

V.

Conceding that the Central Railroad and Banking Company of Georgia is liable upon the contract, appellants are not entitled to an equitable preference over lien or other creditors.

The question which must be met upon this phase of the case is, whether there are such equitable circumstances which surround the claim of the appellants as to give them an equitable preference over all other creditors and over the mortgage lien.

The circuit court of appeals seems to be of the opinion that the mere fact that the debt was one for supplies, and created within a short time previous to the receivership, was sufficient of itself to give the equitable preference.

We contend that before the equitable preference can be given to the unsecured creditor, and the vested contract lien of the mortgage displaced, it must appear that not only the debt belonged to the favored class, but that, in addition to

this, there has been a consent on the part of the mortgagee, either express or implied, from peculiar circumstances of the case, sufficient to raise an estoppel; or, that such a long time has elapsed between the default on the mortgage and the receivership as will impute laches to the bondholders, and make it equitable that the bondholder should pay the debts which he would have necessarily contracted if he had availed himself of his remedy; or that, by a diversion of income, the bondholder has reaped a benefit to the prejudice of the supply creditor which equity will not allow him to retain; in other words, he has received something which equity will compel him to restore.

Ever since the announcement of the doctrine of equitable preference in Fosdick *vs.* Schall, 99 U. S., 235, this Court has been carefully confining the claims to cases where the equity of the supply creditor is very strong, and the limits within which the preference is allowed have been very much narrowed.

In Huidekoper *vs.* Locomotive Works, 99 U. S, 258, it was held that the vendor of a locomotive occupied "the position of a general creditor, with no special equities in his favor."

In Miltenberger *et al. vs.* Logansport, etc., R'y, 106 U. S., 286, the majority of bondholders expressly consented to the priority of ticket and freight balances, and the trustee and minority bondholders, who intervened to contest their priority, were estopped by their laches from denying their acquiescence. It must be observed in this case that the receiver had already paid the unsecured debts for ticket and freight balances. The Court remarked:

"Many circumstances may be suggested which may make it necessary and indispensable to the business of a road and the preservation of the property for the receiver to pay preexisting debts of certain classes out of the earnings of the receivership or out of the corpus of the property under the order of the Court, with a priority of lien, yet the discretion to do so should be exercised with great care. The pay-

ment of such debts stands *prima facie* on a different basis from the payment of claims arising under the receivership, while it may be practically within the principle of the latter."

This was the first case in which this Court actually applied the doctrine of Fosdick *vs.* Schall.

Hale *vs.* Frost, 99 U. S., 389, is similar to the Bowen case, hereinafter referred to. In this case the bondholders were constructively consenting to a diversion of income to their benefit by neglecting, under peculiar circumstances, for a long time after default to foreclose the mortgage, during the period of which neglect the diversion occurred.

Union Trust Co. *vs.* Souther, 107 U. S., 591, shows clearly the element of consent. The Court, at the inception of the litigation, passed an order that the supply and labor debts incurred within six months should be paid from net earnings. The Court said: "The income of the receivership, instead of being applied in accordance with the order to pay debts for supplies and labor, was used with the consent, and, it may be inferred, at the request of the bondholders, to buy additional grounds and rolling stock," etc., and the Court concluded that under these circumstances there was no impropriety in appropriating the money from the sale of the mortgage estate to pay the creditor specially provided for when the receiver was appointed.

In Burnham *et al. vs.* Bowen, 111 U. S., 776, the mortgage was made June 1, 1871, and no interest was ever paid on the bonds, but the foreclosure did not occur until 1875. A coal bill was allowed priority. The ground of the decision was that the mortgage being in default and the mortgagee permitting the road to be operated by the company could not object to paying a bill which it (the mortgagee) would have had to pay if it had proceeded to foreclose. The Court said:

"The debt due Bowen was incurred to keep the road running, and thus preserve the security of the bondholders. If

the trustees had taken possession under the mortgage, they would have been subjected to similar expenses to do what the company, with their consent and approbation, was doing for them."

In the case of Union Trust Co. *vs.* Morrison, 125 U. S., 591, in which a surety on railroad bonds was allowed a preference over mortgage creditors, there were three reasons for the preference: (1) The express consent of the mortgagees. (2) Laches in failing to pursue the remedy of foreclosure for a long time. (3) An actual diversion of the income.

In the case of St. Louis, Alton & T. H. R. R. *vs.* Cleveland, etc., R'y, 125 U. S., 658, a claim for rent under a lease was denied priority. The claim was pressed upon the theory that it was an unpaid operating expense, and therefore entitled to a preference. The Court denied that this of itself was sufficient and said:

"Admitting, therefore, that the reasonable rent of the leased line accruing to the petitioner was a proper charge upon the gross income of the Indianapolis & St. Louis Railroad Company as a part of its current operating expenses before any net income could arise applicable to the payment of interest on the mortgage bonds, it must still be essential to entitle petitioner to the relief prayed for that the arrearage due on account thereof has arisen by the diversion and misappropriation of the fund that ought to have been applied to its payment to the use and benefit of the mortgage bondholders."

In the case of Kneeland *vs.* American Loan & Trust Co., 136 U. S., 89, where this whole subject of preferential claims is discussed, the Court concluded that the claim for rent of rolling stock was not entitled to a preference over the mortgages, because there was the absence of any act from which it could be inferred that the mortgagees had consented to the preference, and that there were circumstances that raised an estoppel. The Court said:

"It is the exception and not the rule that such priority of liens can be displaced. We emphasize this fact of the

sacredness of contract liens for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of the displacement of vested liens."

In the case of Morgan's, etc., Co. *vs.* Texas Central R'y, 137 U. S., 171, advances made to the railroad for the payment of operating expenses and taxes were denied priority of payment. The Court, in referring to the doctrine in Fosdick *vs.* Schall, remarked:

"The property being in the hands of the court for administration as a trust fund for the payment of encumbrances, the court, in putting it in condition for sale, may, if needed, recognize the claims of materialmen and laborers, and some few others of a similar nature, accruing for a brief period prior to its intervention, where current earnings have been used by the company to pay mortgage debt or improve the property instead of to pay current expenses under circumstances raising an equity for their restoration, as, for instance, where a company being insolvent and in default is allowed by the mortgage bondholders to remain in possession and operate the roads long after that default has become notorious, or where the company has been suddenly deprived of the control of its property, and the pursuit of any other course may lead to cessation of operation."

In the case of Quincy, etc., R. R. *vs.* Humphreys, 145 U. S., 82, the claim of priority in favor of rentals was disallowed because the fact that there was an immense floating debt for supplies precluded the inference that there had been a diversion of earnings applicable to the payment of rental, and upon the further ground that there was no consent on the part of the mortgagee to have the claim charged upon the corpus of the property.

In Thomas *vs.* Western Car Co., 149 U. S., 95, a claim for car rental that accrued prior to the receivership was disallowed, there being no equitable considerations for the allowance, as in the Miltenberger case.

Testing this case in the light of the decisions which we have cited, there does not appear any equitable reason why the appellants should be given a preference, because—

First. It must be observed that **the court did not pass any order** at the inception of the receivership for the payment of creditors of this class. We do not mean to be understood as contending that because such an order was not passed at the inception of the litigation, the preference cannot now be allowed. We call attention to the fact to show that the court did not make the payment of such debts a condition of the receivership and to negative the idea that there may have been any consent to the payment of such debts on the part of the mortgagee.

Second. **There has not been any laches** on the part o the mortgage creditors. As soon as the opportunity arose the mortgagees took advantage of their rights. The default on the first mortgage took place on July 1, 1892. The mortgagee could not foreclose until six months had elapsed (Record, pp. 12, 13). His foreclosure suit was begun January 23, 1893, and the receiver who had theretofore been appointed at the instance of the mortgagor was continued as receiver under the foreclosure bill.

Third. **There has been no diversion** in the case in the sense in which that term is employed in the decisions of this Court. The decisions are to the effect that the diversion must not only be to the prejudice of the supply creditor, but it **must have given some advantage to the mortgagee which he ought not equitably to have**. Here was a case in which a railroad company was put in the hands of a receiver on the 4th of March, 1892, upon the suit of a stockholder, in which there was no suggestion of the insolvency of the mortgagor company. For a year previous to this time the income arising from the operation of the railroad of the mortgagor had been used by its lessee,

and all the income on its bonds and stocks had likewise been used by its lessee. The lessee had agreed to pay the interest on all lessor's obligations. The January interest was paid by the Danville Company, and not by the Central Company, the mortgagor. Under all these circumstances can it be contended that there has been such a diversion from the current income of the Central Company as would give an unsecured supply creditor a preference over the vested contract lien of the mortgagee? The circuit court of appeals said: "In this case, the equities are especially favorable to the intervenors, for it appears that there was a diversion of the income for the payment of interest upon bonds of the Central railroad in January, 1892, some two months before the receivers were appointed," etc. If this is an equitable ground for the allowance of a preference, it is a dangerous thing for a mortgagee to receive the interest on his bonded debt. There is not a scintilla of evidence in the case to show that the payment of the interest on the bonds was a diversion of the current income. There is not even any evidence in the case showing whether or not the income which arose from the operation of the railroad was sufficient to meet the claims of all its creditors, or whether it was entirely inadequate for that purpose. There is nothing in this case to indicate that debts for operating expenses had been permitted to accumulate in order to enable the mortgagor to meet the interest on its bonded debt, and thus avoid insolvency or tide over a temporary embarrassment, or that the mortgagee was upon any notice that the interest upon these bonds was being paid to the detriment of the supply creditors of the railroad. We do not understand that an equity court will allow a supply creditor a preference merely because the interest on the bonded debt has been paid. Viewing this case in the light of the spirit of the decisions of this Court, it cannot be said that the mere payment by the Danville Company of the interest upon the bonds of the Central railroad in January, 1892, when no one dreamed of

an insolvency, is such a diversion of the income of the mortgagor as to prefer a supply creditor.

Fourth. The **only other ground** upon which the circuit court of appeals put the allowance of the preference was their finding that the **receivers expended from the income for improvements** on the railroad property a sum much larger than the claims of the intervenors. The following statement appears in the agreed statement of facts (Record, p. 13): "It is a fact that since the receivership the receivers of the Central Railroad & Banking Company of Georgia have expended [for] betterments in its railroad lines from the income of the road during the receivership a sum much larger than the entire claim of the intervenor." The term "betterments" is rather vague and indefinite. In its ordinary acceptation, as applied to railroad properties, it represents such purchases as new equipment to replace old, new rails to replace old rails, and numerous other expenditures which may not be absolutely essential to the operation of the railroad, but which may be necessary to the economical operation of the railroad and to the advantage of all persons concerned, the unsecured creditor as well as the secured.

This receivership was begun on March 4, 1892. The appellants became parties to the litigation on May 26, 1892. The Farmers' Loan and Trust Company, the trustee of the bondholders under the first mortgage, did not become a party until July 4, 1892, when it was made a defendant to the bill filed by the Central Company. It was not made a party defendant in the stockholders' bill of Mrs. Rowena M. Clarke. The foreclosure bill was filed January 23, 1893. The income of the railroad was pledged under the mortgages (Record, p. 12). The expenditures made by the receivers for betterments were made while the appellants were parties to the litigation and without any objection from them. Until January 23, 1893, the mortgagees had nothing whatever to do with the expenditures of the receivership.

They were all made, it is fair to assume, under the order of the court, and were necessary for the preservation of the *res*. **It does not appear that the betterments were of such a character as to substantially improve the mortgage property.** It does not affirmatively appear that the mortgage security has been enhanced with the consent or connivance of the mortgagee at the expense of the unsecured creditors, and the mere fact that on a large system of railroads more than $40,000 was expended in what is ordinarily understood by the word "betterments" ought not to be sufficient alone to give the unsecured creditor the coveted preference.

Fifth. If appellants' case is to be strengthened by proof of expenditures for betterments, it **must affirmatively appear that these expenditures were made before the court had sequestered for the use of the bondholders the income which was pledged to them** and which after January 23, 1893, became theirs; but it does not appear whether these expenditures were made by the receivers under Mrs. Clarke's bill or under the bill filed by the Central Company or under the trustees' bill for foreclosure. The stipulation on this subject was made after appeal, which was March 31, 1894. The receivership was then twenty-five months old, and fourteen of these months were under the foreclosure bill. It is more fair to infer that the expenditures were made during these fourteen months than to infer that they were made during the eleven preceding months.

But, even if we should infer otherwise, inference will not do. If it be contended that these expenditures can affect the case at all (which we deny), then it is incumbent on appellants, under the decisions we have cited, to show affirmatively that they were made before the bondholders had asserted their rights and sequestered for their benefit the income which was theirs. Not only have they not shown this, but they have by inference proven that the receivers

expended for improvements only money which belonged to the bondholders. It should not be taken from them twice.

VI.

The appellants are not entitled to recover against the Central Railroad and Banking Company of Georgia, nor are they entitled to a preference as to the coal which was found in the bins of the Central railroad at the time of the appointment of the receivers and subsequently used by them.

The appellants cannot recover for this portion of the coal, for the reason that it was sold by them to the Richmond and Danville Railroad Company under a contract made with that company to which the Central Railroad and Banking Company of Georgia was neither a party nor a privy.

When the railroads of the Central Company were turned over to the Danville Company the latter company also received fuel and other material and supplies (see the lease, Record, p. 22), and it is proper to assume that there was at that time a reasonable amount of coal in the bins, which was taken possession of by the Danville Company. When the Danville Company surrendered possession it was, under the twenty-first article of the lease (Record, p. 30), under obligations to return the same amount of coal; and when the receivers took possession of the coal in the bins they only **took possession of that which belonged to the Central Company** under the solemn contract of the Danville Company. The Central Company had turned over to the Danville Company all its material, supplies, and fuel and all its property, and all of the earnings of the Central had been appropriated by the Danville Company. (Record, p. 8, last line.)

The Central Railroad and Banking Company of Georgia

should not be held liable for the coal found in the bins, because it is **incapable of proof whether the coal found in the bins was the coal of the intervenors or not.** The intervenors entered into a mutual agreement (Record, p. 63) that each of them would claim and demand of and against the receiver of the Central railroad such amount of the total coal found in the bins or the value thereof at the time of the receiver's appointment as is in proportion to their respective total debts. The master found (Record, p. 63) that the coal companies which entered into this agreement were the only coal companies that furnished coal used in the operation of the Central railroad for a year prior to the receivership, and from this concluded that the coal in the bins belonged collectively to the coal companies which entered into said agreement. It is a matter of common knowledge that the last coal which was furnished to the railroad company would probably be the first used, and therefore there is no reason why the master should have concluded that this coal which was found in the bins of the Central railroad was the coal of these coal companies, rather than the same coal which was in the bins when the railroad was turned over to the Danville Company. The coal was incapable of identification and was not identified.

VII.

SUMMARY.

The judgment of the circuit court should be affirmed, with costs, because—

First. There was no contract between the Central Company and the appellants.

(*a.*) Appellants made an express contract with the Danville Company and furnished the coal on the Danville's credit.

(*b.*) They did not make any contract with the Central Company, and the contract which purported to be in its name was made by one entirely unauthorized by and disconnected with the Central.

(*c.*) The Danville Company, although it had the right to operate the lines of the Central Company, had no right to bind the Central corporation by a contract.

Second. The Georgia statute of 1876 gives no statutory lien in favor of supply creditors. It applies only to debts contracted during the receivership.

Third. No preference in favor of appellants should be decreed, because—

(*a.*) As to coal delivered and consumed prior to the receivership, the intervenors have asked for no preference, but only for a plain judgment.

(*b.*) For the coal delivered and consumed after the receivership they have been paid.

(*c.*) For the coal delivered before and consumed after the receivership they have asked only for judgments against the receiver.

(*d.*) There is no proof that the coal which the receivers found in the bins was furnished by the appellants, but whatever was there was properly taken possession of by the receivers.

(*e.*) There has been no diversion of income by payment of coupons. All that the record shows is that the Danville Company, which received all of the income from the railroad and all of the income from investments of stocks and bonds, paid coupons maturing two months before the receivership.

(*f.*) There has been no diversion of income by expenditures for improvements. Even the income which was expended for "betterments" was pledged to the mortgagee and had been previously sequestered for its benefit by the appointment of a receiver.

(*g.*) There has been no laches on the part of the mortgagee; it acted as soon as its rights accrued.

(*h.*) There has been no consent, express or implied, by the mortgagee.

Respectfully submitted.

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For Appellees.